

# **WEBINAR WEDNESDAYS**



**Wednesday, February 10, 2021**

## **Addressing Sexual & Domestic Violence: Disarming BATTERERS**

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**In re the Matter of: PHYLLIS ANN MANSOUR, Plaintiff/Appellee,**

**v.**

**ROSS PATRICK CUPPLES, Defendant/Appellant.**

**No. 1 CA-CV 13-0550**

**Court of Appeals of Arizona, First Division**

**September 23, 2014**

Not for Publication – Rule 111(c), Rules of the Arizona Supreme Court

Appeal from the Superior Court in Maricopa County No. FN2013-052298 The Honorable

Julie Newell, Judge Pro Tempore

Phyllis Ann Mansour, Peoria Plaintiff/Appellee in Propria Persona

Ross Patrick Cupples, Anthem Defendant/Appellant in Propria Persona

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Kent E. Cattani joined.

### **MEMORANDUM DECISION**

KESSLER, Judge:

¶1 Appellant Ross Patrick Cupples ("Cupples") appeals the superior court's order granting and affirming an order of protection and the Notice to Sheriff of Positive Brady Indicator ("Notice of PBI")<sup>[1]</sup> in favor of his former wife, Appellee Phyllis Ann Mansour ("Mansour"). Cupples raises several issues over which we have jurisdiction, whether: there is sufficient evidence to support the superior court's order affirming the order of protection and Notice of PBI; the superior court violated Cupples' due process rights by not allowing him to fully present his case; and the superior court erred in finding Cupples misrepresented information to it.<sup>[2]</sup> For the reasons stated below, we affirm the superior court's decision continuing the order of protection and Notice of PBI.

### **FACTUAL AND PROCEDURAL HISTORY**

¶2 Cupples and Mansour were married from 1981 until 1997. According to Mansour's testimony, Cupples emotionally, psychologically, and physically abused Mansour during the marriage, and "tried to kill [her] on the day that [she] separated from him."

¶3 When Mansour first separated from Cupples in November of 1994, she obtained and properly served an order of protection against Cupples in Michigan. Mansour renewed this order of protection twice during their divorce proceedings, in 1995 and 1996. In 1996, Cupples pled guilty to misdemeanor stalking based on his actions in violation of these orders of protection.

¶4 Cupples and Mansour's final divorce decree, which resulted from binding mediation, was filed in 1997. The divorce decree provided for a permanent restraining order, which, "based on [Cupples'] conduct during the parties' marriage and subsequent to the initiation of [the] action, " prohibited Cupples from having contact with or harassing Mansour. Although Cupples denied having notice of this provision, he admitted during the proceedings in the superior court that he received a copy of the decree and was represented by counsel at the trial and appellate stages of the divorce.

¶5 After the divorce, both parties separately moved to Arizona. Cupples testified he rented a home in Anthem in 2001 and registered his vehicle in Arizona in August of 2001. In 2003, Cupples

purchased a home in Anthem. Mansour was transferred to Arizona by her employer in August of 2002, and purchased a home in Peoria. Both parties claim they did not know the other party moved to Arizona prior to 2003 or 2004.

¶6 Mansour testified she first saw Cupples in 2004, at a hockey game. Cupples stood between her seats and the ice, "with his back to the ice facing [Mansour] and the people [she] was with that evening." According to Mansour's testimony, Cupples then stood in the aisle, at the top of the steps, as Mansour and her guests came up to the concession and restroom area. Cupples admitted to being at the game and seeing Mansour, but denied having any contact with her.

¶7 In 2008, while working for Chase Bank, Mansour received an e-mail from the branch manager at Anthem Chase Bank stating that Cupples, claiming to be her "former college classmate, " wished to speak to her about moving his business accounts to Chase.<sup>[3]</sup> In his opening brief, Cupples admitted to speaking "with a representative of Chase Bank in Anthem to inquire if [his] ex-wife was still with their organization, " and that he referred to her as a college acquaintance "to avoid getting into unpleasant details." Cupples claims this inquiry was a precaution and that the representative "took it upon himself to send [Mansour] an email advising her to contact [Cupples]."

¶8 Cupples' attempts at contact continued. In 2009, Cupples sent a letter and package to Mansour's parents in Sun City West, containing possessions Cupples believed to have belonged to them. Then, in 2010, Cupples left a checkerboard on Mansour's front porch after the University of Michigan and Michigan State rivalry game. The checkerboard featured pieces representing the University of Michigan and Michigan State, Mansour and Cupples' alma maters respectively. A note was included with the checkerboard that read: "3 IN A ROW!!!" Although Cupples claimed Mansour dropped the game off on his doorstep first, Mansour denied doing so.

¶9 Finally, Cupples conceded to making several attempts to contact Mansour in late 2011. In November, Cupples sent Mansour a letter at her home address and called her direct phone line at Wells Fargo, her employer at the time. In December, Cupples sent Mansour an e-mail at her work and a Christmas card to her home address. Mansour never responded and reported these incidents to the police.

¶10 Cupples was thereafter prosecuted in the Peoria municipal court for interference with judicial proceedings.<sup>[4]</sup> In 2012, the Peoria municipal court found the restraining order included in the Michigan divorce decree applicable and found Cupples guilty, sentencing him to three years' suspended jail sentence, three years' probation, and domestic violence classes. Mansour also obtained and properly served an ex parte order of protection against Cupples, granted by the Peoria municipal court.

¶11 On July 15, 2013, Mansour petitioned the superior court of Arizona in Maricopa County for a renewal of her 2012 order of protection. After an ex parte hearing, the superior court granted Mansour's request. Mansour properly served Cupples with the order of protection. Cupples requested a hearing and filed a motion to vacate order of protection, motion to seal, and amended supplemental pleadings and response to plaintiff's request for extension of protective order. An evidentiary hearing was set for July 29, 2013.

¶12 After taking testimony from both parties, allowing Cupples to cross-examine Mansour, and accepting exhibits from both parties, the superior court found Cupples not to be credible. Further,

the superior court found by a preponderance of the evidence that Cupples had committed an act of domestic violence or may commit an act of domestic violence in the future, and that good cause existed to continue the order of protection. Finally, because Cupples failed to address the allegations of abuse purported by Mansour and the superior court found significant evidence that physical violence would possibly occur, the court issued the Notice of PBI.

¶13 Cupples filed a timely appeal.<sup>[5]</sup> We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, Arizona Revised Statutes ("A.R.S.") sections 12-2101(A)(1), -2101(A)(5)(b), and Rule 9(B)(2) of the Arizona Rules of Protective Order Procedure.

## **DISCUSSION**

### **I. Standard of Review**

¶14 We review the decision of the superior court to affirm an order of protection for an abuse of discretion. *Cardoso v. Soldo*, 230 Ariz. 614, 619, ¶ 16, 277 P.3d 811, 816 (App. 2012). "The court abuses its discretion when it makes an error of law in reaching a discretionary conclusion or 'when the record, viewed in the light most favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision.'" *Michaelson v. Garr*, 234 Ariz. 542, 544, ¶ 5, 323 P.3d 1193, 1195 (App. 2014) (quoting *Mahar v. Acuna*, 230 Ariz. 530, 534, ¶ 14, 287 P.3d 824, 828 (App. 2012)). All findings of fact necessary to affirm will be inferred, provided those findings are supported by the evidence and do not conflict with the superior court's express findings. *Thomas v. Thomas*, 142 Ariz. 386, 390, 690 P.2d 105, 109 (App. 1984). "We review any questions of law de novo." *Michaelson*, 234 Ariz. at 544, ¶ 5, 323 P.3d at 1195.

### **II. Mootness**

¶15 Although orders of protection expire a year after service on a defendant, see A.R.S. § 13-3602(K) (Supp. 2013), and this order of protection expired before the appeal came before this panel, this appeal is not moot. "Because expired orders of protection carry with them significant collateral legal and reputational consequences, " this Court has held them not to be "moot for purposes of appellate review." *Cardoso*, 230 Ariz. at 619, ¶ 14, 277 P.3d at 816.

### **III. Sufficiency of Evidence - Order of Protection**

¶16 Cupples first argues the superior court erred in continuing the order of protection after the hearing because there was insufficient evidence to support the continuation of the order. We disagree.

¶17 A court must issue an order of protection if "the court determines that there is reasonable cause to believe . . . [t]he defendant may commit an act of domestic violence . . . [or] has committed an act of domestic violence within the past year or within a longer period of time if the court finds that good cause exists to consider a longer period." A.R.S. § 13-3602(E). "Domestic violence" is not limited to crimes of physical violence. Rather, domestic violence includes crimes of harassment<sup>[6]</sup> and stalking,<sup>[7]</sup> as long as a plaintiff and defendant are in one of the relationships enumerated by A.R.S. § 13-3601(A) (Supp. 2013) (incorporating by reference A.R.S. §§ 13-2916 (Supp. 2013), 13-2921 (2010), and 13-2923 (Supp. 2013)). Those enumerated relationships include a "relationship between the victim and the defendant" based on "former marriage . . . or having resided in the same household." A.R.S. § 13-3601(A).

¶18 Although the record demonstrates no acts of domestic violence occurred in the year prior to

the hearing on July 29, 2013, there is evidence in the record of an extensive history of both physical and non-physical domestic violence. Mansour testified that she suffered emotional, psychological, and physical abuse, at the hands of Cupples, during their marriage, including an attempt by him to kill her. Further, Cupples previously pled guilty to misdemeanor stalking. Finally, Mansour provided evidence of, and testified to, numerous unwanted attempts by Cupples to contact Mansour, spanning over several years and through 2011, long after Cupples' guilty plea and their final divorce decree had been entered.

¶119 Such an extensive history, largely unrefuted by Cupples, established reasonable cause to believe Cupples might commit an act of domestic violence in the future, at a minimum in the form of stalking or harassing Mansour. As such, the superior court did not abuse its discretion in continuing the order of protection after the hearing.

#### **IV. Sufficiency of the Evidence - Brady Notice**

¶120 Cupples next argues the superior court erred in issuing the Notice of PBI. We disagree.

¶121 When issuing an order of protection, a court may "prohibit the defendant from possessing or purchasing a firearm for the duration of the order" as long as "the court finds that the defendant is a credible threat to the physical safety of the plaintiff or other specifically designated persons." A.R.S. § 13-3602(G)(4). Because such action by a court implicates a defendant's right to possess firearms under the United States Constitution and the Arizona Constitution, a higher standard of review applies than for an order of protection, *see Mahar*, 230 Ariz. at 534, ¶ 15, 287 P.3d at 828, and "[a] restriction against firearms does not automatically follow an order of protection." *Savord v. Morton*, 235 Ariz. 256, 260, ¶ 22, 330 P.3d 1013, 1017 (App. 2014). To ensure this review occurs, Rule 6(C)(5)(d)(1) of the Arizona Rules of Protective Order Procedure requires a trial court to "ask the plaintiff about the defendant's use of or access to weapons or firearms" in order to "determine if the defendant poses a credible threat to the physical safety of the plaintiff."

¶122 In this case, at the July 15 ex parte hearing, the superior court questioned Mansour regarding whether or not Cupples owned any firearms. Mansour stated she did not believe Cupples did, but indicated that "he does come to [her] house." Further, during the contested hearing on July 29, Mansour confirmed she feared Cupples may turn violent towards her or use a weapon against her, and testified regarding the extent to which she had made attempts to secure her home as a result of Cupples' past actions. Finally, the record reflects allegations of emotional and physical abuse during the marriage, as well as an attempt by Cupples to strangle or suffocate Mansour on the day she left him. The superior court found that Cupples' failure to refute these serious allegations, despite the court providing him with opportunity to do so by cross-examining Mansour or testifying himself, provided "significant evidence to believe that [there was a] possibility [that] physical violence [would] occur."<sup>[8]</sup> In view of this record, the superior court did not err by issuing the Notice of PBI, impliedly finding that because there was significant evidence of a threat of physical violence, Cupples was a credible threat to the physical safety of Mansour.

#### **V. Due Process Claim**

¶123 Cupples next argues the superior court violated his due process rights by not allowing him to address Mansour's allegations. We disagree.

¶124 Due process, under the Fourteenth Amendment to the United States Constitution and

Article 2, Section 4, of the Arizona Constitution, "entitles a party to notice and an opportunity to be heard at a meaningful time and in a meaningful manner, " as well as to the opportunity "to offer evidence and confront adverse witnesses." *Curtis v. Richardson*, 212 Ariz. 308, 312, ¶ 16, 131 P.3d 480, 484 (App. 2006). Such notice must be "reasonably calculated to apprise [a party] of the action in order to adequately prepare his [or her] opposition." *Savord*, 235 Ariz. at 260, ¶ 16, 330 P.3d at 1017. In an effort to safeguard parties' due process rights, Rule 8(D) of the Arizona Rules of Protective Order Procedure requires that a trial court "ensure that both parties have an opportunity to be heard, to present evidence and to call and examine and cross-examine witnesses" during a contested hearing.

¶25 In this case, the record demonstrates Cupples had adequate notice of Mansour's allegations of domestic violence and stalking, as he was served with Mansour's petition eleven days before the contested hearing. The record further establishes that the superior court, by allowing Cupples to present evidence, cross-examine Mansour, and testify at the hearing, provided Cupples with a meaningful opportunity to be heard. Although the court ended the hearing notwithstanding Cupples' request to be allowed to address Mansour's claim that he tried to kill her, Cupples had already denied the allegation and did not make an offer of proof as to what else he would have testified to on that issue.<sup>[9]</sup> As such, the superior court's decision to end the hearing, electing not "to tolerate . . . misrepresentation" by Cupples, did not violate Cupples' due process rights.

## **VI. Misrepresentation**

¶26 Finally, Cupples argues the superior court erred in finding he misrepresented information regarding an ex parte hearing in the Peoria municipal court. We disagree.

¶27 "The trial court is in the best position to judge the credibility of the witnesses, the weight of evidence, and also the reasonable inferences to be drawn therefrom." *Goats v. A. J. Bayless Mkts., Inc.*, 14 Ariz.App. 166, 171, 481 P.2d 536, 541 (1971). Therefore, this Court generally "defer[s] to the trial court's determination of witnesses' credibility, " as long as there is reasonable evidence in the record to support the determination. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347-48, ¶ 13, 972 P.2d 676, 680-81 (App. 1998); see also *Jesus M. v. Ariz Dept of Econ. Sec*, 203 Ariz. 278, 208, ¶ 4, 53 P.3d 203, 205 (App. 2002) (noting that the trial court is best situated to "observe the parties, judge the credibility of witnesses, and make appropriate findings").

¶28 At the end of the July 29 hearing, the superior court stated Cupples' credibility "ha[d] been pretty well tainted." Throughout the hearing, the superior court had difficulty eliciting responsive answers from Cupples and openly questioned his credibility on several occasions. At times, Cupples claimed that he had never been served with the Michigan order of protection, but later conceded, only after repeated questions from the court, that he had received the divorce decree which included a permanent order of protection. Similarly, Cupples disputed his violations of prior protective orders, but later conceded that he had pled guilty to such violations.

¶29 Cupples focuses on the July 29, 2014 minute entry and the transcript from that hearing in which the superior court found Cupples was not credible because he misrepresented information concerning an ex parte hearing held in the Peoria municipal court regarding an ex parte order of protection in July 2012. Based on Cupples' arguments in the superior court, the court concluded he was making "it sound like" the ex parte hearing was his trial for interference with judicial

proceedings, when in fact the ex parte hearing was for the issuance of the initial 2012 order of protection.

¶30 Cupples claims the record "clearly shows that [he] differentiated" between the order of protection hearing which he was excluded from and his trial for interference with judicial proceedings. However, the record reflects that at the time of the misrepresentation, the superior court was questioning Cupples about his interference with judicial proceedings conviction. In responding to the superior court's inquiry, Cupples stated several times he was ordered out of the courtroom during the morning hearing on the day of trial. It was only after the superior court attempted to clarify and stated several times it did not believe Cupples that Cupples stated the morning hearing he was ordered out of concerned only an order of protection, not Cupples' interference with judicial proceedings trial.

¶31 Given the superior court's difficulty in eliciting responsive answers from Cupples and evident skepticism regarding other portions of Cupples' testimony, and given the superior court's role in assessing witness credibility, the record reflects reasonable evidence supporting the superior court's finding that Cupples misrepresented information regarding the ex parte hearing in the Peoria municipal court.

## **VII. Requests for Costs**

¶32 Cupples requests an award of "legal fees and costs of \$1, 000" on appeal. Because Cupples has not prevailed on any of his argument on appeal and "failed to cite any authority supporting his claim for fees and he is appearing *pro se*, " we deny his request pursuant to Arizona Rule of Civil Appellate Procedure 21. *Simon v. Maricopa Med. Ctr.*, 225 Ariz. 55, 64, ¶ 40, 234 P.3d 623, 632 (App. 2010).

## **CONCLUSION**

¶33 For the foregoing reasons, we affirm the superior court's order upholding the order of protection and Notice of PBI against Cupples.

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Notes:

[1] The Brady notice refers to the federal Brady Handgun Violence Prevention Act, Pub.L. No. 103–159, 107 Stat. 1536 (1993); see *also* 18 U.S.C. § 922(g)(8)(c)(i)-(ii), (9) (2012) (providing that firearm possession "shall be unlawful" for a person who is subject to a court order that includes a finding that the person represents a credible threat to the physical safety of another person or an order that prohibits the use of threatened physical force that would reasonably be expected to cause bodily harm).

[2] Appellant raises several additional jurisdictionally barred issues. First, Appellant disputes, at great length, the validity of two previous orders of protection from Michigan and the City of Peoria. We have no jurisdiction to review an order of protection from another state, and orders of protection from a court of limited jurisdiction, such as the municipal court, must be first appealed to the superior court. Ariz. R. Protective Order P. 9. Appellant also appears to challenge his conviction and sentence in the City of Peoria's municipal court for violation of the Michigan order. Again, this Court lacks jurisdiction to address this issue, as parties to litigation in Arizona municipal courts are to "appeal from a municipal court to the superior court." Ariz. Rev. Stat. ("A.R.S.") § 22-

425(B) (Supp. 2013); see also A.R.S. § 22-261 (Supp. 2013). Finally, Appellant requested that we award him punitive damages against the Appellee. This reflects a fundamental misunderstanding of the role of this Court, which is to review the record on the order of protection, not award damages for alleged injuries. See A.R.S. § 12-2101 (Supp. 2013) (judgments and orders that may be appealed).

[3] Mansour did not respond to the e-mail.

[4] Mansour also filed a report with the Peoria police department in 2012 as a result of suspicious activity at her residence. Mansour testified someone repeatedly rang her doorbell that evening then began scraping a stick across one of her windows. Although she admitted to not seeing Cupples, Mansour reported to police and testified that she believed it might have been him. Cupples denied this allegation.

[5] Mansour failed to file an answering brief. While we could regard this failure as a confession of error, see ARCAP 15(c), we exercise our discretion in declining to do so, see *Thompson v. Thompson*, 217 Ariz. 524, 526 n.1, ¶ 6, 176 P.3d 722, 724 n.1 (App. 2008).

[6] Harassment requires a person, "with intent to harass or with knowledge that the person is harassing another person, " to engage in "conduct that is directed at a specific person and that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person." A.R.S. § 13-2921(A), (E) (2010).

[7] Stalking requires a person to "intentionally or knowingly engage[] in a course of conduct that is directed toward another person" and that conduct to be of a type that would either "cause a reasonable person to fear for the person's safety" or "cause a reasonable person to fear death of that person." A.R.S. § 13-2923(A) (Supp. 2013). Further, the conduct must have, in fact, resulted in that person fearing for their safety or life. *Id.*

[8] Cupples attempted to address these allegations after the superior court pointed out his failure to do so by stating he "was never charged with attempted murder, and that was fabricated and that's false." However, Cupples never made an offer of proof, beyond this assertion, about what he would have testified to concerning those attacks. Accordingly, even if the superior court erred in not allowing Cupples to testify about those attacks, such putative error was not prejudicial. See Ariz. R. Evid. 103(a)(2) ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and . . . if the ruling excludes evidence, a party informs the court of its substance by an offer of proof . . ."); see also *State v. Gulbrandson*, 184 Ariz. 46, 59, 906 P.2d 579, 592 (1995) (refusing to reach the issue of whether the trial court abused its discretion by excluding testimony because defendant failed to properly preserve the issue by making an offer of proof).

[9] See *supra* note 8.

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